

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK
JUDGMENT

Case No.: HC-MD-CIV-ACT-DEL-2019/03450

In the matter between:

THE PRESIDENT OF THE REPUBLIC OF NAMIBIA

PLAINTIFF

and

MARA JANUARY

DEFENDANT

Neutral Citation: *The President of the Republic of Namibia v January* (HC-MD-CIV-ACT-DEL-2019/03450) [2021] NAHCMD 278 (04 June 2021)

Coram: PRINSLOO J

Heard: 23, 24 & 25 March 2021

Delivered: 4 June 2021

Reasons: 8 June 2021

Flynote: Damages – Motor vehicle collision – negligence – Two mutually destructive versions – Onus is on plaintiff and defendant to prove on the balance of probabilities that each of their version is to be believed.

Negligence - Failure to keep a proper look out – Failure to heed emergency sirens and give right of way - What constitutes - plaintiff and defendant involved in motor vehicle collision - Plaintiff suing for damages - Defendant counterclaimed - Plaintiff contributing to the collision - Negligence of defendant greater than the plaintiff.

Summary: The issues for determination at trial were the negligence of either party in causing the collision and both are found to have been negligent in causing the collision, their respective degrees of contributory negligence.

The plaintiff seeks to hold the defendants liable on the basis of averments suggesting that the sole cause of collision was the negligent driving of the defendant. The defendants' case is that the collision was caused by the sole, alternatively contributory, negligence of the plaintiff.

The claim of the plaintiff turns on one main point and that is that the plaintiff's vehicle, which was engaged in VIP escort service, had right of way. The defendant plead that the vehicle driven by the plaintiff's driver was not an emergency vehicle, alternatively was not properly equipped to be an emergency service vehicle and therefore the plaintiff's driver did not have the right to disregard the rules of the road.

Held that an ordinary motorist is bound to give immediate and absolute right of way to a privileged vehicles like a motorcade as is clear from s 337, however a privileged driver exercising his right of way is not entitled to proceed against the traffic sign unless and until the driver has satisfied himself or herself that it is safe to proceed and that by doing so he or she will not endanger other traffic lawfully proceeding across his or her intended line of travel.

Held that a privileged vehicle would be entitled to disregard traffic signs, however this is not an unlimited right. Emergency vehicles or privileged vehicles are enjoined to exercise this right with due consideration and regard to the safety of other road users.

Held further that it is the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have

regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street.

Held accordingly that both parties were negligent and that both parties' fault in relation to the damages is assessed by the degree of negligence attributable to the plaintiff at 70 % and the defendant's degree of negligence attributable to the defendant at 30%.

ORDER

1. Judgment in favour of the plaintiff to the extent of 30 per cent of its claim, being N\$87 150.
2. Interest at the rate of 20% per annum from date of judgment to date of payment.
3. Judgment in favour of the defendant to the extent of 70 per cent of her claim, being N\$ 114 902.20.
4. Interest at the rate of 20% per annum from date of judgment to date of payment.
5. Plaintiff to pay 70 per cent of the defendants' costs in respect of the counterclaim. Such cost to include the cost of one instructed and one instructing counsel.
6. Defendants to pay 30 per cent of the plaintiff's costs in respect of the plaintiff's claim.

JUDGMENT

PRINSLOO J

Introduction

[1] The matter before me is a delictual claim which arose as a result of a motor vehicle accident that occurred on 16 June 2017 shortly after 13h00 in the intersection of Jan Jonker and Robert Mugabe road between a Mercedes Benz E 250 motor vehicle with registration number GRN 269 and BMW 320d motor vehicle with registration number BLUESKY.NA.

[2] The plaintiff is the Government of the Republic of Namibia herein represented by the President and the defendant is Mara January, an adult female residing in Windhoek.

Pleadings

[3] The plaintiff pleads that on the date and time in question a collision occurred between the BMW vehicle driven by the defendant and the Mercedes Benz motor vehicle driven by Mr Paulus Nashixwa during the course and scope of his employment.

[4] The plaintiff avers that the collision was caused solely as a result of the negligence of the defendant in that:

- a) the defendant failed to keep a proper lookout of the road;
- b) the defendant failed to consider other road users in that she failed to give right of way to vehicle GRN 269, while being driven in an escort with sounding device on;
- c) the defendant failed to obey traffic rules while driving, in that she failed to give right of way to a privileged vehicle;
- d) the defendant failed to exercise a degree of care normally expected from a reasonable driver under the same prevailing circumstances;
- e) the defendant failed to take the necessary steps to avoid the collision;
- f) the defendant drove at excessive speed;
- g) the defendant failed to apply her brakes timeously, or at all.

[5] The plaintiff pleads that as a result of the accident the plaintiff's vehicle was damaged beyond economic repair and as a result the plaintiff suffered damages in

the amount of N\$ 330 500, which is the difference between the market value of the vehicle less the wreckage value of N\$ 90 000.

[6] The defendant pleaded in her amended plea that the sole cause of the collision was as a result of the negligent driving of Mr Paulus Nashixwa, the driver of the plaintiff.

[7] The defendant in turn avers that the plaintiff's driver was negligent in one or more of the following respects:

- a) he failed to keep a proper lookout;
- b) he travelled at an excessive and dangerous speed in the prevailing circumstances;
- c) he failed to prevent a collision when in the position to do so;
- d) he failed to exercise due care for other road users;
- e) he failed to exercise due care and precaution whilst driving;
- f) he drove at a speed that was excessive under the circumstances;
- g) he failed to give right of way to the defendant, who was traveling straight ahead through a robot-controlled intersection, with the traffic light displaying green for the defendant;
- h) by turning right at a robot-controlled intersection when it was not safe and appropriate to do so and while other oncoming vehicles, including the vehicle driven by the defendant, had right of way;
- i) he failed to keep proper control of the vehicle; and
- j) encroaching into the lane of travel of oncoming vehicles, when it was not safe or appropriate to do so.

[8] The defendant further pleads that the vehicle driven by the plaintiff's driver was not an emergency vehicle, alternatively was not properly equipped to be an emergency service vehicle and therefore the plaintiff's driver did not have the right to disregard the rules of the road.

[9] The defendant also instituted a counterclaim against the plaintiff for damage suffered as a result of the accident in the amount of N\$ 164 146.16. Further the

defendant pleads that she suffered damages as her vehicle had to be towed at a cost of N\$ 2 971.06. The claim of the defendant is however limited to the amount of N\$ 164 146.16.

[10] The defendant prayed that the plaintiff's claim be dismissed with costs, alternatively that any amount owing to the plaintiff, which is denied, be apportioned in terms of s 1 of the Apportionment of Damages Act, 34 of 1956, in respect of what the court finds to be reasonable and fair, taking into consideration either party's degree of negligence.

Pre-trial order

[11] The pre-trial order incorporated all the averments regarding the issue of negligence that were pleaded by the respective parties as well as ownership of the vehicles and quantum of the damages suffered. However, at the commencement of the trial the parties agreed that the issue of ownership of the vehicles is no longer in issue nor was the defendant's quantum of damages any longer in issue.

[12] The court is thus, on the issues of fact, called upon to adjudicate the following:

- a) the quantum of damages in respect of the plaintiff's vehicle; and
- b) to consider the facts and make findings on the following:
 - a. the lane in which the defendant was driving in;
 - b. whether the defendant had right of way;
 - c. the speed that the defendant was traveling;
 - d. the point of impact on the vehicles;
 - e. the point of impact on the road in respect of the two vehicles;
 - f. the point of rest of the two vehicles after the collision;
 - g. the distance where the defendant first noticed or saw the plaintiff's vehicle;
 - h. whether or not the plaintiff encroached on the defendant's lane.

[13] On the issue of law the court is called upon to adjudicate on the following:

- a) the issue of negligence in respect of either party;

- b) whether a driver who has right of way on the road has a duty to yield for oncoming privileged vehicle.
- c) liability in respect of the respective parties;
- d) whether the element of duty of care, breach and causation can be inferred by the facts and if so, what will be required to neutralise negligence;
- e) the respective parties' contributory negligence and if applicable, at what ratio should it be apportioned.

Common cause facts

[14] The following appears to be common cause between the parties:

- a) The northern access to Robert Mugabe Avenue was closed off due to road works;
- b) The plaintiff's vehicle travelled from a westerly to an easterly direction and the lanes at the intersection consisted of four lanes, i.e. a slipway to the left, a right turn lane only and two lanes leading straight of which one lane is also for right turning traffic.
- c) The defendant travelled from an easterly direction to a westerly direction with a slipway to the left and two lanes leading straight.
- d) The intersection where the accident occurred is a robot controlled intersection and the robot was green for both vehicles when they entered into the intersection.
- e) The quantum of the damage to the defendant's motor vehicle.

Evidence adduced

On behalf of the plaintiff

[15] The plaintiff called four witnesses to testify on its behalf, namely

- a) Publius Nashixwa, the driver of the Mercedes Benz;
- b) Julia Ndeulyatele, the security detail in the Mercedes Benz;
- c) Tuhafeni Shilinge, the messenger stationed at State House;
- d) Gregor Ngongo, from Government Garage.

[16] Mr Nashixwa is employed with the Ministry of Safety and Security and is seconded and attached to the Directorate: Former President's Support Services in the Office of the President as the driver and bodyguard of the former First Lady since 2007.

[17] Mr Nashixwa's evidence can be summarised as follow: He obtained his driver's licence in 1996 and received training in defensive driving during 2009.

[18] On 14 June 2017 at about 13h00 he was assigned as the driver of the former First Lady Ms Pohamba from the Office to the Residence. At the time they were three occupants in the vehicle, i.e. his VIP passenger, the female bodyguard and himself.

[19] Mr Nashixwa drove the black Mercedes Benz with registration number GRN 269 and the said vehicle was escorted by a second vehicle, a similar black Mercedes Benz, bearing a blue light on the roof of the vehicle. In the second vehicle there were two occupants, i.e. the driver of the vehicle and the escort commander.

[20] According to the evidence of Mr Nashixwa he travelled from west to east on the Jan Jonker road and intended to turn right into Robert Mugabe Drive towards the State House.

[21] Upon his approach of the robot controlled intersection there was one vehicle in front of him which also indicated its intention to turn right. This vehicle pulled off to the far left to afford the VIP detail right of way.

[22] According to Mr Nashixwa his vehicle had its hazard lights on and the backup vehicle had its hazards, flashing blue lights as well as its sounding device on as per VIP Protocol and when VIP protocol is engaged then it is practice that other vehicles afford right of way to these vehicles.

[23] As Mr Nashixwa approached the intersection the traffic light was green in his favour so he slowly entered the intersection up to the middle of the intersection. The backup vehicle entered the intersection together with the main vehicle, GRN 269, but

slightly to the rear on the left-side of the vehicle, in order to protect the VIP occupant seated in the left rear of the vehicle. Mr Nashixwa proceeded to execute his turn to the right when he saw the defendant's vehicle fast approaching the middle of the intersection from the opposite direction and he realised that the vehicle was not going to stop. He applied the vehicle's brakes and brought the Mercedes Benz to a complete stop to give the BMW the opportunity to pass, which would have been able to swerve to the unoccupied lane to the defendant's right. The defendant however failed to swerve and drove straight into the left-hand side of the Mercedes Benz.

[24] The former First Lady was immediately removed from the vehicle through the right rear door to the backup vehicle, which forthwith left the scene of the accident, ushering the former First Lady to safety.

[25] The police attended to the scene and Mr Nashixwa remained in attendance until such time that statements were obtained and the scene of the accident was cleared.

[26] During cross-examination Mr Nashixwa testified that the vehicle that was in front of him was about to enter the intersection when it came to a stand-still which allowed him to drive around the stationary vehicle and enter the intersection. When Mr Diederick's pointed out the contradiction in his evidence, Mr Nashixwa stated that he probably misunderstood the question. I will deal with issue in more detail further in the judgment.

[27] When confronted with the defendant's version that there was no backup vehicle present Mr Nashixwa was adamant that the backup vehicle was indeed present and the former First Lady was removed from the scene with the said vehicle. The witness could however not explain why the driver of the backup vehicle or the escort commander was not called to testify.

[28] On questions regarding the point of impact the witness confirmed that the point of impact was in defendant's the lane of travel, as the Mercedes Benz encroach in the defendant's lane, and an accident was inevitable if the defendant continued on her original lane of travel through the intersection.

Julia Ndeulyatele

[29] The next witness was Julia Ndeulyatele, the security detail and bodyguard to the former First Lady, Ms Pohamba. Ms Ndeulyatele is attached to the Ministry of Safety and Security and seconded to the Office of the Former President as a bodyguard to the former First Lady since 2016.

[30] On the said date and time Ms Ndeulyatele was a passenger in GRN 269 and was seated in the front passenger seat, with the former First Lady being seated behind her on the left side of the vehicle.

[31] When they left the office of the former First Lady they were accompanied by an escort vehicle and both vehicles were traveling up the Jan Jonker Road to turn right at the robot controlled intersection in the direction of the State House. According to the witness the backup vehicle was behind their vehicle at all material times.

[32] When they approached the intersection the traffic light was green and there was one vehicle ahead of them. This vehicle apparently pulled towards the far left of the road to give way to their approaching vehicles. Ms Ndeulyatele explained that there were road works to the left of the intersection and there were barriers blocking left turning traffic into Robert Mugabe Avenue.

[33] As Mr Nashixwa entered the intersection the witness saw a white BMW approaching the intersection from the opposite direction at a high speed. According to the witness the hazard of their vehicle was on and apparently Mr Nashixwa also indicated his intension to turn right.

[34] Mr Nashixwa brought their vehicle to a complete stop in the intersection and according to the witness she thought the defendant's vehicle would pass their vehicle as there was sufficient space for her to do so but instead drove into their vehicle and collided with the left front side of the Mercedes Benz.

[35] Immediately after the accident the former First Lady was removed from the vehicle by Mr Nashixwa, with the assistance of the witness, and placed into the backup vehicle that left the scene of the accident immediately. The witness remained at the scene of the accident until she was picked up by another vehicle.

Tuhafeni Shilinge

[36] Mr Shilinge testified that he is employed with the Government of Namibia at the Office of the President as a messenger and has been so employed since 2007.

[37] On the date in question the witness was on his way back to the State House driving a government vehicle. He was traveling in the same direction as GRN 269 and as he was approaching the intersection of Jan Jonker Road and Robert Mugabe Avenue the robot was red. He however heard the sound of sirens approaching from behind although he could not see the escort vehicles.

[38] He proceeded slightly into the intersection when the robot turned green and when he saw the two black Mercedes Benz vehicles approaching from the rear he stopped his vehicle to the far right of the road way. The witness stated that he saw the one vehicle had hazards on and the other vehicle had hazards, blue light and sounding device on and he knew it was escort vehicles.

[39] When the vehicles approached the intersection they were traveling in the middle lane and when the vehicles entered the intersection the vehicle at the rear moved up to almost next to the front vehicle and they turned at the same time. The front vehicle however came to a standstill in the intersection and the second vehicle stopped at the left rear side of the front vehicle.

[40] The witness saw a BMW approaching the intersection but the driver of the BMW did not stop in time and collided into the front Mercedes Benz with registration number GRN 269.

[41] The witness testified that he thought that the BMW would pass around the front of the Mercedes Benz as there was enough space to do and there were no other vehicle in the lane next to the BMW.

[42] After the accident the witness saw the former First Lady being removed from the damaged vehicle and she was immediately removed from the scene by the backup vehicle.

[43] Mr Shilinge immediately left the scene and went to his office at the State House where he informed one Mr Kafula, who was in charge of the vehicles at State House, of the accident that occurred.

[44] During cross-examination the witness was questioned about the escort vehicles and which of the two vehicles was driving in the front. The witness was unable to say which of the two was the front vehicle and was also unable to say if the blue light was on or not. The witness indicated that if he only focused on the lights he would fail in his duty as a driver.

Gregor Ngongo

[45] The fourth and last witness was Mr Gregor Ngongo who is employed as a Works Inspector Officer at the Ministry of Works and Transport and is stationed at the Government Garage. The witness was called as a factual witness and not as an expert witness.

[46] Mr Ngongo testified that after the Mercedes Benz E250 registration number GRN 269 was towed from the accident scene to the Government Garage he attended to call for a quotation from Star Body Works CC in accordance with the Public Procurement Act 15 of 2015.

[47] According to the witness Star Body Works CC is the only agency which may attend to government vehicles which are still under warranty, and a quotation for the reparation of the vehicle was received on 15 November 2018.

[48] On 23 April 2019 he then inspected the vehicle and recorded the vehicle's condition in a Vehicle Condition Report and technical inspection form, which is used to record the damage and to seek authorisation from Treasury to write off the vehicle and sell the wreck on auction.

[49] The witness testified that it is procedure that damage on each government vehicle must be assessed and in order for the Ministry to be able to sell a vehicle on auction the cost of damages to be recovered must be calculated. The witness calculated the estimated repair costs on N\$ 225 110, while the estimated value of the wreck, was N\$ 90 000.

[50] The cost of damages was calculated to be the difference between the book value of the vehicle less the wreckage value, i.e. N\$ 420 500 less N\$ 90 000= N\$ 330 500.

[51] As a result of these calculations Mr Ngongo recommended that repair to the vehicle would not be economically viable and that the wreckage should be sold on auction. Mr Ngongo's position was fortified by the fact that Star Body Works' quotation for the repair cost was N\$ 606 756.96.

[52] During cross-examination Mr Ngongo testified that the book value of the vehicle was obtained from M&Z Motors but he was not aware as to how the book value was calculated. The witness however conceded that the condition of the vehicle as the well as the kilometres of the vehicle must be taken into consideration in determining the book value of the vehicle.

[53] When questioned regarding the difference between his figures in respect of the repairs and that of Star Body Works, the witness testified that his figures were mere estimations.

[54] When confronted with the value of the wreckage it was determined that the wreck was sold for N\$ 130 000 and not for N\$ 90 000 as per the estimation of the witness.

On behalf of the defendant

[55] The defendant, Mara January, was the only witness to testify in respect of her case as quantum is no longer in issue and therefore there was no further need to call an expert in that regard.

[56] The defendant testified that on the date in question she was driving a white BMW with registration number BLUSKY.NA and after she picked up her grandson from St Paul's College she travelled along the Jan Jonker Street in a westerly direction. The traffic at the time was bumper to bumper up to the intersection of Jan Jonker Street and Robert Mugabe Avenue where there is a slipway towards the left, resulting in the traffic easing up and the defendant had a clear view of the intersection.

[57] She proceeded straight into the robot controlled intersection and almost cleared the intersection when the black Mercedes Benz, which appeared out of nowhere, executed a turn to the right hand side and as a result moved into her path of travel.

[58] The witness testified that as a result of the manoeuvre by the Mercedes Benz a collision occurred.

[59] During cross-examination the witness denied that she was speeding on the day in question. She testified that she travelled between 40 and 60 km/h. She further denied that the Mercedes Benz was in a motorcade or that it was escorted by another vehicle. The witness was adamant that the Mercedes Benz had neither flashing lights nor a sounding device on. The witness stated that after the accident occurred the driver of the Mercedes Benz did not have time to put his hazards off and when she confronted the other driver after the accident about his manoeuvre, he just replied that they were in a convoy. The witness stated that the driver never asked if she did not see his hazard lights on.

[60] The witness testified that if the lights and sounding device were on she would have given the Mercedes Benz right of way and would have stopped.

[61] When questioned about the former First Lady that was removed from the vehicle the witness testified that she did not see the former First Lady but instead she saw a lady, whose head was covered. She did not see this lady being removed from the Mercedes Benz but she noticed a lady that was taken to a cream coloured pick-up that stood to the left side of the road, which drove off in direction of the State House.

[62] The witness further stated that the Mercedes Benz was not stationary in the intersection as testified on behalf of the plaintiff but in motion as it moved into her path of travel.

Accident report

[63] In terms of the accident report compiled by the Namibian Police the Mr. Nashixwa recorded as follows:

'I was driving from west to east direction with escort of Former First Lady, we were having two car, the main car and backer-up, I was driving the main car, then intersection of Jan Jonker and Robert Mugabe the traffic light was green and I was turning right into Robert Mugabe. The moment I turned right into Robert Mugabe I was bumped by BMW which is coming from east to west into Jan Jonker.'

[64] The defendant recorded:

'I was driving from an eastern direction towards the west. At the intersection of Jan Jonker rd and Robert Mugabe Ave the robot was green and I had right of way. A black Mercedes Benz with GRN registration 269 turned right in front of me and we collided.'

[65] Mr. Nashixwa also deposed to a statement on 16 June 2017, which he appeared to have written himself and although the statement is similar to the accident report he added in the statement of 16 June 2017 '...the moment I turned right into Robert Mugabe I was bumped ...'

Mutually destructive versions

[66] The versions of the two parties are diametrically opposite to each other. The acceptance of one version will lead to the rejection of the other.

[67] When dealing with mutually destructive versions the court will have regard to the following dictum by Eksteen AJP in *National Employers General Insurance Co. Ltd v Jagers*¹ represents the law in Namibia:

‘ [W]here the onus rests on the plaintiff . . . and where there are mutually destructive stories, he can only succeed if he satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff’s allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff’s case any more than they do the defendant’s, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant’s version is false.’

[68] In the current matter the plaintiff and defendant both and respectively have the onus to prove their conflicting claims on a preponderance of probabilities.

Evaluation of the evidence adduced

[69] There were a number of contradictions between the evidence of the plaintiff’s witnesses and in some instance these witnesses contradicted themselves as well.

[70] It is the evidence of Mr Nashixwa that when he approached the intersection there was one vehicle ahead of him, which gave way to him. When confronted with how this vehicle gave way Mr Nashixwa initially stated (in his witness statement) that the said vehicle, while in it was in the middle of the intersection pulled off to the far left side. This would mean that Mr Nashixwa was in the right turn only lane at the time. During cross-examination the witness stated that the car pulled off to the right, effectively placing that car in the right turn only lane, and Mr Nashixwa passed the

¹ 1984 (4) SA 437 (E) at 440D-G. It was cited with approval by the Supreme Court in *Burgers Equipment and Spares Okahandja CC v Aloisius Nepolo T/A Double Power Technical Services Case NO.: SA 9/2015* (unreported) delivered on 17 October 2018, at para 112.

said vehicle by driving in the middle lane, from where traffic can either proceed straight or turn to the right. When it was brought to Mr Nashixwa's attention that there is an elevated island on the right and to be able to pull to the right the other vehicle would have to scale up the island, the witness changed his reply to 'the vehicle just stopped to allow us to pass'.

[71] When confronted with the three different version Mr Nashixwa's explanation was that maybe the interpreter misunderstood him, bearing in mind that Mr Nashixwa has a good command of the English language and if anything was incorrectly interpreted he would have picked up on it. When confronted with the witness statement wherein he stated that the vehicle in front of him pulled off to the far left then the witness changed his version back to what he initially stated in the witness statement i.e. that the vehicle pulled off to the far left.

[72] Mr Nashixwa testified that he slowly entered into the intersection and when he saw that the BMW would not stop he brought his vehicle to a dead stop, albeit in the BMW's lane. This evidence differs considerably with the accident report wherein Mr Nashixwa stated that when he entered into the intersection, the BMW collided with the plaintiff's vehicle. In fact in the statement of 16 June 2017 the witness said the moment he entered into the intersection the accident occurred, i.e. immediately upon entering the intersection.

[73] There is a vast difference between Mr Nashixwa bringing his vehicle to a standstill to enable the BMW to swerve and thereby avoiding an accident but the BMW drove straight into the stationary Mercedes Benz as opposed to the Mercedes Benz being in a forward motion entering the intersection and as a result the BMW collided with the Mercedes Benz.

[74] The version of Mr Nashixwa which he recorded shortly after the accident seems to actually support the defendant's version that the Mercedes turned into her lane of travel.

[75] The contradictions by Mr Nashixwa is important as it completely changes the dynamics of how the accident occurred.

[76] A further issue arose when Mr Nashixwa contradicted himself in his evidence that the BMW was fast approaching the intersection but did not mention the issue of the speeding BMW in the accident report. The witness' explanation for the difference between his evidence and the accident report is that he explained what happened to the official recording the incident and he just signed the form. The witness could

however not explain why this important detail was also left out from a statement that he recorded in his own hand on 16 June 2017.

[77] Ms Ndeulyatele was not of much assistance with her evidence as she stated that she is not acquainted with the roads and could not recall the lane that their vehicle travelled on. What is of significance in her evidence is that the witness testified that when they entered the intersection the BMW was still a distance away. This is contradicting Mr Nashixwa's statement in the accident report as well as his subsequent statement.

[78] Ms Ndeulyatele was adamant that their vehicle had its hazards and lights on in compliance with VIP escort protocol. What is interesting is the fact that this witness testified that the driver engaged the vehicles right indicator a distance away from the intersection, but when confronted during cross-examination that if the hazards are on then one would not see the indicator the witness chose not to respond.

[79] When asked about the vehicle that was at the intersection when they approached the witness initially said that she could not recall if they passed that vehicle to enter the intersection but that the said vehicle gave way. Apart from that the witness was quite unsure as to the position of the other vehicle. She first indicated that the vehicle stopped and then later in her evidence stated that the vehicle moved to the left side of the road where there were barriers which were closing off access to Robert Mugabe Avenue.

[80] The witness testified that the Mercedes Benz came to a standstill in the intersection but was unable to say where in the intersection it came to a stop nor was she unable to state how soon after coming to a standstill did the accident occur.

[81] Mr Shilinge confidently declared in his witness statement that he was slowly entering the intersection when he could see the two vehicles approaching from the rear with lights (hazards and blue light) and sounding device on. He then pulled off to the far right and stopped his vehicle. This is contrary to what Mr Nashixwa stated, and keep in mind that Mr Shilinge was apparently the only vehicle at the intersection which travelled from the direction of the plaintiff's vehicle.

[82] During cross-examination Mr Shilinge was asked which of the vehicles was driving in front, he could not say and he was then also no longer sure if he saw the blue light or not. What is interesting in this regard is that when the witness was asked whether the hazard lights of the vehicles were on or not, he said he would not have

seen the vehicles if it was not for the hazards. The fact that stood out to this witness was thus not the blue light and/or the sound of the sirens although the witness stated that he heard the sirens.

[83] When confronted with the finer details of what lights and on which car were on or off and which of the cars was in the front the witness became evasive and he stated that he heard the sounding device and if he only focused on the lights he would fail in his duty as a driver. Further in his evidence, in order to avoid answering the questions about the lights on the vehicles and sequence of the vehicles, the witness stated that when he is driving he focuses on the vehicle that he is driving.

[84] When considering the evidence of the defendant there are few issues that stand out. The witness testified that she was almost out of the intersection when the Mercedes Benz came out of nowhere and turned in front of her. If one has regard to the photographs that were submitted into evidence it is clear that the defendant was not even half way through the intersection.

[85] The defendant confirmed that she came from the easterly direction and that there is a slight decline as one approaches the intersection and the witness was therefore at a more elevated position than the approaching vehicles and would as a result have a good view of the approaching vehicles. It is therefore improbable that she did not see the Mercedes Benz approaching the intersection. At the time she might not have known that the Mercedes Benz intended to turn to the right but she must have seen the vehicle.

[86] The defendant's version is also not that Mercedes Benz travelled a high speed, in fact she confirmed during cross-examination that if the Mercedes Benz travelled faster then there would have been more damage caused to the vehicles. This is all the more reason why she must have seen the Mercedes Benz.

Legal principles applicable and application to the facts

[87] Both drivers' point of departure in this matter is that they had right of way.

[88] The claim of the plaintiff turns on one main point and that is that the plaintiff's vehicle, which was engaged in VIP escort service, had right of way. In this regard the plaintiff relies on s 337 of the Road Traffic and Transport Regulations, 2001, which reads as follows:

'337 Stopping of vehicle for State motorcade.

(1) The driver of a vehicle on a public road must, when being approached or passed by a State motorcade –

(a) where the road is demarcated into one traffic-lane for his or her direction of travel, stop the vehicle at the extreme left of the road;

(b) where the road is demarcated into two traffic-lanes for his or her direction of travel, stop the vehicle in a safe position at the extreme left of the road if he or she is in the left lane, or adjacent to any vehicle which may be to his or her left if he or she is in the right lane;

(c) where the road is demarcated into more than two lanes for his or her direction of travel, stop the vehicle in a safe position;

(d) where the vehicle is stopped in any lane at a controlled intersection, remain stationary and only proceed when instructed to do so by means of the hand signals of a traffic officer; or

(e) where the road is not demarcated in two traffic-lanes for his or her direction of travel, stop the vehicle at the extreme left of the road.

(2) A person driving a vehicle may not overtake or attempt to overtake any vehicle in a State motorcade.

(3) For the purposes of this regulation, “controlled intersection” means an intersection where the traffic is controlled by an automatic traffic signal, hand signals of a traffic officer or a stop sign or give way sign.’

[89] S 337 requires ordinary road users to give way to State motorcades and it regulates what steps motorists must follow in order to allow such a motorcade to pass unimpeded.

[90] Mr Nashixwa testified that VIP Protocol was engaged during the escort of the former First Lady but did not elaborate what the VIP Protocol entails, apart from having the relevant lights and sound device on and being escorted by a backup vehicle.

[91] The question that arises is whether a VIP escort, like the one in question, would resort under the provisions of s 337 of the Regulations.

[92] The answer can be found in s 1 of the Regulations which defines a “State motorcade” as ‘a motor vehicle or a group of motor vehicles traveling together for the purposes of conveying Namibian or foreign state dignitaries and escorted by traffic officers or military police to ensure a safe and unimpeded journey for the motor vehicle or motor vehicles’.

[93] According to the evidence of Mr Nashixwa his vehicle was accompanied by an escort vehicle that was equipped with blue flashing lights and a sounding device.

According to Mr Nashixwa the occupants of the backup vehicle were police officers, Sgt Sikirete and C/Insp Amadhila, who was the escort commander.

[94] The definition of a state motorcade requires an escort by traffic officers or military police. S 1 of the Act defines traffic officer to mean 'a traffic officer appointed under section 11, and includes a member of the Namibian Police Force as defined in section 1 of the Police Act, 1990 (Act No. 19 of 1990)'.

[95] Therefore technically the constitution of the VIP escort on the day in question could fall within the ambit of the meaning of state motorcade, and for purposes of this judgment I will regard the vehicle driven by Mr Nashixwa as a privileged vehicle.

[96] The next issue is whether the passenger that was transported by Mr Nashixwa would be regarded as a Namibian dignitary. The evidence before me is that the passenger was the former First Lady. The defendant placed this fact in dispute as the person who was removed from the plaintiff's vehicle had her head covered. There is however no reason for me not to accept the evidence of Mr Nashixwa and that of Ms Ndeulyatele that the other passenger in the vehicle was the former First Lady. There can be no argument that the former First Lady would be regarded as a dignitary.

[97] What does concern me about the evidence of Mr Nashixwa is that the backup vehicle that travelled with the main vehicle, did not travel in front of it but behind it. I find it interesting that the VIP Protocol would require the vehicle with the sounding device and the blue flashing light on the roof to travel behind the vehicle that it is escorting. The purpose of the sounding device and the flashing blue light is to convey to other road users the urgency of their journey and that the general road users should give right of way.

[98] The defendant is vehemently denying that there was a backup vehicle or any flashing blue lights and sirens. Mr Shilinge, called on behalf of the plaintiff, was floundering during cross-examination regarding the visibility of the blue flashing lights but was firm on having heard sirens. At first he was confident that he saw the blue flashing lights but as cross-examination progressed he became unsure of himself to the extent that he could not say if the lights were on and if so which of the vehicles the lights were mounted on.

[99] It should be clear that the warning apparatus on the emergency vehicle (or privileged vehicle) must be clearly visible and audible and that such apparatus was

operative at a stage that the other driver was capable of observing such apparatus and had sufficient opportunity to react thereto².

[100] Having considered the evidence before me I am not convinced that the blue flashing lights were on. The evidence of the defendant is that if the warning lights were on she would have seen it and would have stopped and gave way to the vehicle. From her position as she approached the intersection it would be unlikely that the defendant would not see blue flashing lights, even if she did not hear warning sirens.

[101] I find it strange that the plaintiff elected not to call any of the police officials of the backup vehicle who would have been able to lay the issue of the warning lights to rest and also to testify on their observations of how the accident happened as it happened right in front of them.

[102] It was argued on behalf of the defendant that the failure to call these witnesses should be interpreted to mean that there was no backup vehicle. This argument is without merit, however it does raise a question as to why the plaintiff failed to call critical witnesses who are still available.

Duties of a driver who enters an intersection and duty to give way

[103] An ordinary motorist is bound to give immediate and absolute right of way to privileged vehicles like a motorcade as is clear from s 337, however a privileged driver exercising his right of way is not entitled to proceed against the traffic sign unless and until the driver has satisfied himself or herself that it is safe to proceed and that by doing so he or she will not endanger other traffic lawfully proceeding across his or her intended line of travel.

[104] A privileged vehicle would be entitled to disregard traffic signs, however this is not an unlimited right. Emergency vehicles or privileged vehicles are enjoined to exercise this right with due consideration and regard to the safety of other road users³.

[105] In *Rondalia Assurance Corp of S.A Ltd v Collins N.O*⁴ the court held that drivers of privileged vehicles are entitled to make a much higher assumption as to what other vehicles will do than the ordinary driver may. They know that other drivers

² HB Klopper. *The Law of Collisions in South Africa* 7th ed at 77.

³ *Johannesburg City Council v Putco* 1963(3) SA 157(W) at 159H-160D.

⁴ 1969(4) SA 345 (T).

know or ought to know that they are privileged and have a right to assume that other traffic will be careful and keep out of its way⁵. However, on the other hand a driver of a privileged vehicle who failed to notice traffic approaching an intersection is not entitled to say that he assumed that such traffic would become aware of him and act accordingly. Such a driver must particularly be careful to make sure that no other traffic with green light in its favour is about to enter the intersection or otherwise that all such traffic has become aware of his presence and his intention to go forward against the red robot⁶.

[106] In the *Rondalia* case an ambulance driver entered a robot controlled intersection against a red signal and relied on the fact that he is driving a privileged vehicle and failed to see an approaching motor cycle was held to be negligent.

[107] So what was the duties of the respective drivers when they entered into the intersection?

[108] S 334 of the Regulation directs the procedure when right turning as follows:

‘(2) The driver or a vehicle on a public road who desires to turn to the right must, having due regard to regulation 333, before reaching the point at which he or she intends to turn, indicate in the manner prescribed in these regulations, his or her intention to turn and may not effect the turn unless he or she can do so without obstructing or endangering other traffic and -

(b) (ii) where the turn is at an intersection he or she may not encroach on the right half of the roadway into which he or she intends to turn, except in the intersection itself but must in any event pass to the left of any traffic island in the intersection or comply with the direction conveyed by an appropriate road traffic sign, but where the turn is to be made into a roadway intended for traffic in only one direction, he or she may encroach on the right half of that roadway.’

[109] In *Sheehama v Nehunga*⁷ Frank AJA discussed the duty of a driver intending to make a right turn as follows:

‘[28] Where a driver intends to make a right turn, the law places on such a driver that by necessity turns out of his or her path a more stringent duty than that placed on a motorist who wishes to overtake:

⁵ Supra at 347 E.

⁶ Supra at 347 E-G.

⁷ (SA 13-2019) [20021] NASC (7 April 2021).

'In a long line of cases both in the Provincial Divisions as well as in this Division, it is clearly stated that to turn across the line of oncoming or following traffic is an inherently dangerous manoeuvre and that there is a stringent duty upon a driver who intends executing such a manoeuvre to do so by properly satisfying himself that it is safe and choosing the opportune moment to do so.'⁸

and

[30] The test to apply for the motorists executing right turns and the one which I intend to follow is the one articulated in the *Olivier* case namely:

'This seems to me to be the ultimate test to apply in deciding whether a right-hand turn of the kind now under consideration was legitimately or culpably undertaken; the inquiry is: was it opportune and safe to attempt the turn at that particular moment and in those particular circumstances? Whether it was opportune and safe, or not, will depend upon whether a *diligens paterfamilias* in the position of the driver at that time and in the circumstances then prevailing would have regarded it as safe. (Cf. *Kruger v. Coetzee*, 1966 (2) S.A. 428 (A.D.) at p. 430). In that inquiry, assumptions which may have been made by the driver and the extent to which the driver kept under observation other vehicles, are together with other incidents relevant to the occasion, factors to be taken very much into account, but no one of these factors will necessarily or even probably provide the answer to the ultimate question.'⁹

[110] Mr Nashixwa contradicts himself as to how the accident happened. On the one hand he stated that the collision occurred the moment when he entered the intersection and on the other hand he testified that he saw the defendant is not going to stop and brought his vehicle to a standstill in the intersection, whilst encroaching in the lane of the defendant.

[111] I am of the view that the version presented to court by Mr Nashixwa that he stopped in the intersection and that the defendant drove straight into his vehicle came as an afterthought. He did not mention this at all in the accident report and Mr Nashixwa's explanation of the discrepancy between the two versions do not hold any

⁸ *A Mutual Insurance Association Ltd v Nomeka* 1976 (3) SA 45 (A) at 52E-G and *Boots Co (Pty) Ltd v Somerset West Municipality* 1990 (3) SA 216 (C) at 224-225.

⁹ *S v Olivier*, at 84A-B. See also *Johannes v South West Transport (Pty) Ltd* 1992 NR 358 (HC) at 361G-J.

water. Even if the official incorrectly recorded the sequence of events prior to the collision it does not explain why Mr Nashixwa recorded the exact same sequence of events, in his own hand, two days later. He made no mention of stopping in the intersection, nor did he mention anything about traveling in a VIP escort.

[112] Mr Nashixwa had no less than three versions in respect of the vehicle that was already at the intersection and how he was able to enter the intersection. The version that he finally stuck with was that the vehicle in front of him pulled off to the far left. This is not in line with the evidence of Mr Shilinge who was the driver of that vehicle.

[113] In order for Mr Shilinge to pull off to the far left he must have been in the middle lane and the plaintiff's vehicle in the left turn only lane, otherwise Mr Shilinge would have crossed Mr Nashixwa's line of travel, which would in all likelihood have caused an accident.

[114] Mr Shilinge testified that he entered the intersection but when he heard the sirens he stopped just inside the intersection. Mr Nashixwa had to go around Mr Shilinge and just proceeded further into the intersection, without stopping or giving right of way to the approaching traffic.

[115] Mr Shilinge was pertinently asked during cross-examination whether the escort vehicles stopped in the intersection prior to the collision and he stated that he did not observe that the cars stopped, he just heard the sound of the vehicles colliding.

[116] The defendant also testified that the plaintiff's vehicle did not stop in the intersection and that the vehicle came out of nowhere and the collision occurred.

[117] Ms Ndeulyatele's evidence in my view is of minimal assistance, even though she confirmed that Mr Nashixwa brought the vehicle to a standstill in the intersection prior to the collision but when she was confronted with the defendant's version that the Mercedes Benz came from nowhere and that is why she bumped it, Ms Ndeulyatele elected not to comment. Ms Ndeulyatele was vague or unsure on a number of issues and not much reliance can be placed on her evidence regarding the actual collision.

[118] I am of the considered view that plaintiff's version that Mr Nashixwa brought the vehicle to a standstill in the intersection to allow the defendant to pass stands to be rejected and his first version as set out in the accident report and his subsequent statement should be accepted as the true sequence of events.

[119] It is common cause that under normal circumstances the defendant had the right of way as she was on her way to pass through the intersection. The defendant was already in the intersection when Mr Nashixwa entered the intersection. He saw the defendant as she was approaching the intersection but could not be sure that the defendant saw his vehicle. Mr Nashixwa clearly laboured under the idea that he had an absolute right of way and that the defendant had to stop and as he entered into the intersection he turned into the defendant's path of travel as that is also where the impact took place.

[120] In my considered view Mr Nashixwa was negligent when he entered into the intersection and started to execute his turn whilst it was clearly not safe for him to do so on the assumption that defendant would stop. Not even emergency vehicles has the rights that Mr Nashixwa thought his vehicle had.

[121] In the matter of *Robinson Bros v Henderson*¹⁰ where Solomon, CJ said:

'(a) Now assuming that, as the defendant himself admitted, the plaintiff in the circumstances had the right of way, the whole question would appear to be whether he acted reasonably in entirely ignoring the approaching car on the assumption that the driver would respect his right of way and would avoid coming into collision with him. In my opinion that was not the conduct of a reasonable man. It is the duty of every driver of a motor car when approaching a crossing, no matter whether he believes he has the right of way or not, to have regard to the traffic coming from a side street. There is necessarily a certain amount of danger in approaching a crossing, and it is the duty of every driver to exercise reasonable care to avoid coming into collision with another car entering the crossing from a side street. Having seen such a car, he is not justified in taking no further notice of it, on the assumption that the driver is a careful man and may be relied upon to respect his right of way. If every driver of a motor car were a reasonable man there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard. The duty of the plaintiff in

¹⁰ 1928 AD 138 at 141-2.

this case was to keep the car coming down Alice Street under observation, and not to have entirely lost sight of it merely because he had the right of way.' [My emphasis]

[122] I am of the view that Mr Nashixwa did not exercise reasonable care to avoid the collision.

[123] Even though I am of the view that Mr Nashixwa was the main cause of the accident I cannot lose sight of the fact that the defendant testified that the Mercedes Benz came from nowhere and she collided with it. As discussed earlier the defendant had a higher advantage point as she approached the intersection coming down a decline and only saw the plaintiff's vehicle when it turned in front of her and could do nothing to avoid the collision. Even if the escort vehicles had no warning lights on and the defendant heard no sirens there was nothing impeding her view of the intersection as she approached it. There was only one other vehicle at the opposite side of the intersection and it is improbable that she did not see the plaintiff's vehicle approaching.

[124] The question is whether the reasonable driver in the defendant's position would have been aware of the approach of the motorcade, and whether she would and could have taken steps to avoid colliding with it.

[125] The answer concerns the reaction of the reasonable driver, who is about to enter an intersection with the lights in his favour. Such a driver is not expected to look out for traffic which can possibly enter the intersection from the left or the right unlawfully against a traffic light. This enables him/her to enter an intersection with confidence, but it does not absolve him/her of the ordinary duty to keep a proper lookout, and to be aware of his surroundings and the movement of other traffic in his vicinity¹¹.

[126] In the matter of *Nogude v Union and South-West Africa Insurance Co Ltd*¹², Jansen, JA said:

¹¹ *Netherlands Insurance Co of SA Ltd v Brummer* 1978 (4) SA 824 (A) 833F and *AA Onderlinge Assuransie Bpk v Manthe* 1980 (1) SA 655 (A) 659D-660A.

¹² 1975 (3) SA 685 (A) at 688A-C.

'A proper look-out entails a continuous scanning of the road ahead, from side to side, for obstructions or potential obstructions (sometimes called "a general look-out": *cf Rondalia Assurance Corporation of SA Ltd v Page and Others* 1975 (1) SA 708 (A) at 718H-719B). It means -" more than looking straight ahead - it includes an awareness of what is happening in one's immediate vicinity. He (the driver) should have a view of the whole road from side to side and in the case of a road passing through a built-up area, of the pavements on the side of the road as well." (*Neuhaus, NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) at 405H-406A.). Driving with "virtually blinkers on" (*Rondalia Assurance Corporation of SA Ltd v Gonya* 1973 (2) SA 550 (A) at 554B) would be inconsistent with the standard of the reasonable driver in the circumstances of this case.'

[127] The defendant entered the intersection before the plaintiff's vehicle. If she had been keeping a proper lookout she would have been aware of the Mercedes Benz presence before either of them entered the intersection. If she had done so, she would have realised that the plaintiff was not going to stop and take evasive steps or brake in time in order to avoid a collision.

[128] I am of the view that the defendant was likewise negligent although not in the degree as the driver of the plaintiff's vehicle

[129] Having considered all the facts before me I am of the view that I can *mero motu* determine both parties' fault in relation to the damages. I therefore assess the degree of negligence attributable to the plaintiff at 70 % and the defendant's degree of negligence attributable to the defendant at 30%¹³.

Damages

[130] The quantum of damages of the defendant's vehicle is common cause between the parties. The quantum of damage in respect of the plaintiff's vehicle was an issue between the parties.

¹³ The claim in convention made no reference to apportionment of damages or joint negligence but the counterclaim raises the possibility in the alternative.

[131] I agree that the estimations done by Mr Ngongo regarding repairs to the plaintiff's vehicle is without merits as he had not basis on which this estimations were done. There was a quotation done by Star Body Works as well which defendant did not take issue with. The mere fact that the Mercedes Benz was written off in any event causes the estimated repair costs to be irrelevant.

[132] The evidence of Mr Ngongo that the vehicle was damaged beyond economical repair was not disputed by the defendant nor was the amount for which the wreck sold on auction placed in dispute.

[133] The market value of the vehicle was determined from information obtained from M&Z Motors. The defendant did not take issue with the source of the information but raised an issue that the condition and the kilometres of the vehicle should be taken into consideration in determining the value. The plaintiff's vehicle was however only two years old at the time and still under warranty and as a result the value as obtained from M&Z Motors would in my view be acceptable.

[134] The value of the damage in respect of the plaintiff's vehicle is the difference in the value of the vehicle immediately prior to the collision and the value thereafter, i.e. the difference in value between the running vehicle and the wreck, i.e. N\$ 420 500 less N\$ 130 000 =N\$290 500.

Order

[135] My order is therefore as follows:

1. Judgment in favour of the plaintiff to the extent of 30 per cent of its claim, being N\$87 150.
2. Interest at the rate of 20% per annum from date of judgment to date of payment.
3. Judgment in favour of the defendant to the extent of 70 per cent of her claim, being N\$ 114 902.20.
4. Interest at the rate of 20% per annum from date of judgment to date of payment.

5. Plaintiff to pay 70 per cent of the defendants' costs in respect of the counterclaim. Such cost to include the cost of one instructed and one instructing counsel.
6. Defendants to pay 30 per cent of the plaintiff's costs in respect of the plaintiff's claim.

JS Prinsloo

Appearances:

On behalf of the Plaintiff

N Mutorwa
Government Attorneys

On behalf of the Defendant

J Diedericks
Instructed by
PD Theron Legal Practitioner
Windhoek